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5 Appellant in Pro Se

6 UNITED STATES DISTRICT COURT  
7 FOR NORTHERN DISTRICT OF CALIFORNIA

8 DEMAS YAN,

9 Appellant,

10 vs.

11 TONY FU et al.,

12 Appellees.

**Case No.: 3:11-CV-01814-RS**

DEMAS YAN'S MOTION TO ALTER OR  
AMEND ORDER NO. 3 COMPELLING  
YAN TO PRODUCE DOCUMENTS

[Pursuant to FRCP Rule 59(e)]

Dept. F

Magistrate Judge: Jacqueline Corley

14 Pursuant to FRCP Rule 59(e), DEMAS YAN hereby motion the court to alter or amend Order  
15 no. 3 filed on 11/28/17 (Dkt. No. 72, hereinafter the "Order") in regards only to the tax returns  
16 ordered to be produced, namely, personal tax returns for the years 2014, 2015, and 2016.

17  
18 ARGUMENT

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20 After the Order to Show Cause hearing on October 27, 2017, Yan filed a supplemental response  
21 with arguments and cites in support of his claim of Fifth Amendment privilege. (Dkt. No. 70.)  
22 Yan's argument relies upon the seminal United States Supreme Court case, United States v. Doe  
23 465 U.S. 605 (1984), which held that compelling producing of documents have communicative  
24 aspects and may be subject to Fifth Amendment Privilege in that it would compel respondent to  
25 "admit that the records exist, that they are in his possession, and that they are authentic." Id. at  
26 612-614.

27 In the Order (Dkt. No. 72), the court cited to Garner v. United States, 424 U.S. 648,  
28 (1976) to support the court's contention that "[t]o the extent [Yan] claims that the returns

1 themselves will disclose some unidentified crime, Mr. Yan's personal tax returns are already  
2 in the possession of the federal government." The court appeared to have misconstrued the  
3 holding in Garner, which does not stand for the proposition that Fifth Amendment privilege  
4 cannot be raised because tax returns are already in possession of the government. The Garner  
5 court held that the government was properly allowed to introduce income tax returns on which  
6 defendant had reported his occupation as "professional gambler" and substantial income from  
7 wagering in prosecution for violation of 18 USCS § 224 to show familiarity with business of  
8 gambling in order to rebut defense claim that his relationships with other coconspirators were  
9 innocent ones. In Garner, the government had possession of the tax returns and sought to  
10 introduce the "contents" of the tax returns. In this respect, the holding in Garner is consistent  
11 with the holding in Doe. In Doe, the Supreme Court held that contents of documents are not  
12 privileged, but the compelled production of documents is tantamount to compelled testimony and  
13 may be privileged. As the court stated in Doe at 613, "Although the contents of a document may  
14 not be privileged, the act of producing the document may be. [citation] A government subpoena  
15 compels the holder of the document to perform an act that may have testimonial aspects and an  
16 incriminating effect. As we noted in Fisher [v. United States, 425 U.S. 391 (1976)]: 'Compliance  
17 with the subpoena tacitly concedes the existence of the papers demanded and their possession or  
18 control by the taxpayer. It also would indicate the taxpayer's belief that the papers are those  
19 described in the subpoena. [citation.] The elements of compulsion are clearly present, but the  
20 more difficult issues are whether the tacit averments of the taxpayer are both 'testimonial' and  
21 'incriminating' for purposes of applying the Fifth Amendment. These questions perhaps do not  
22 lend themselves to categorical answers; their resolution may instead depend on the facts and  
23 circumstances of particular cases or classes thereof.' Id., at 410."

24 Based on the Supreme Court precedents, it is beyond question that the compelled production of  
25 tax documents is compelled testimony subject to Fifth Amendment privilege should the second  
26 element of "incriminating" inference is present.

27 The element of "incriminating" is not a high standard.  
28

1 In the Order, the court cited to Doe ex rel. Rudy-Glanzer v. Glanzer (Glanzer), 232 F.3d 1258,  
2 1263 (9th Cir. 2000) for the rule that in the civil context, the invocation of the Fifth Amendment  
3 privilege is limited to “those circumstances in which the person invoking the privilege  
4 reasonably believes that his disclosures could be used in a criminal prosecution, or could lead to  
5 other evidence that could be used in that manner.” In addition to the above quote in Glanzer, the  
6 Glanzer court also stated that the “‘privilege against self-incrimination does not depend upon the  
7 likelihood, but upon the possibility of prosecution’ and also covers those circumstances where  
8 the disclosures would not be directly incriminating, but could provide an indirect link to  
9 incriminating evidence.” Glanzer, *supra*, at 1263, quoting United Liquor Co. v. Gard (In re  
10 Seper), 705 F.2d 1499, 1501 (9th Cir. 1983).

11 The court in United Liquor Co. v. Gard, *supra*, elaborated on the standard for deciding if the  
12 privilege is availing, stating that “[f]urthermore, the privilege is available if answers “could  
13 possibly” supply such a link. [Citation]. Finally, we note that in this circuit the witness has  
14 considerable latitude in deciding when to stop responding to questions. A contrary rule would  
15 involve the witness in a dilemma that would vitiate the privilege: invoking the privilege too soon  
16 could be contempt of court, while invoking it too late would inadvertently ‘waive’ the privilege.”  
17 Id. at 1502.

18 Here, compelling Yan to produce tax returns in his possession is tantamount to compelling him  
19 to authenticate the documents as that which have been filed with the government and indirectly  
20 vouching for the accuracies of the contents. In order to raise the protection of the privilege, Yan  
21 is not required to articulate that he has committed a crime or that he is likely to be prosecuted.  
22 The privilege may be raised by a person fearing ensnarement into criminal investigations; even  
23 someone who claims that he is innocent of any crime may invoke the privilege. The U.S.  
24 Supreme Court unanimously held that “one of the Fifth Amendment’s basic functions ... is to  
25 protect innocent men ... who otherwise might be ensnared by ambiguous circumstances.” Ohio  
26 v. Reiner, 532 U.S. 17, 21 (2001).

27 It is not necessary for the person asserting the privilege to establish the precise manner in which  
28 he will incriminate himself. It should be easily contemplated that forcing Yan to authenticate tax

1 returns and indirectly authenticating the contents may provide a link to possible investigations in  
2 the context of a debtor examination. Again, Yan stands ready and willing to an in-camera  
3 showing to the court to bear this burden if the court decides that no threat of self-incrimination is  
4 evident.

5 As to the court's statement that Yan had previously been ordered to produce tax returns  
6 in *Li v. Yan*, 247 Cal.App.4th 56 (2016), that decision does not concern the Fifth Amendment  
7 privilege but was on whether the privacy privilege under California law may be raised to  
8 subpoenaed documents in a debtor examination.

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10 For the reasons stated, Yan respectfully ask the court to alter the Order as to the production of  
11 tax returns, or in the alternative, hold an in-camera hearing.

12 Date: 12/26/2017

13 Respectfully Submitted,

14 /s/Demas Yan  
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